

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.104 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

COMMISSIONER OF INCOME-TAX - Applicant(s)

Versus

DAMODAR POLYFAB PVT LTD - Respondent(s)

Appearance :

MRS MM BHATT for Applicant(s) : 1,

NOTICE SERVED for Respondent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 16/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'C', has referred the following two questions under Section 256(1) of the Income-tax Act, 1961 (the Act) at the instance of the Commissioner of Income-tax :

1. “Whether, the Appellate Tribunal is right in law and on facts in directing the Assessing Officer not to deduct the amount of subsidy from the cost of assets for the purpose of calculating depreciation?
 2. “Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to allow carry forward of business loss determined on a belated return of income ?
2. The Assessment Year is 1985-86 and the corresponding accounting period is the year ended on 31st March, 1985.
3. Heard Mrs.M.M. Bhatt, learned Standing Counsel for the applicant revenue. Though served there is no appearance on behalf of the respondent-assessee.
4. In so far as question No.1 is concerned, Mrs.Bhatt has very fairly pointed out that the issue involved stands concluded in favour of the assessee and against the revenue by a decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax Vs. P.J. Chemicals Ltd., [1994] 210 ITR 830 (S.C.). In the circumstances, it is not necessary to set out the facts and contentions in detail. Applying the ratio of the decision in the case of Commissioner of Income-tax Vs. P.J.

Chemicals (supra), it is held that the Tribunal was justified in directing the Assessing Officer not to deduct the amount of subsidy received from the cost of the assets for the purpose of calculating depreciation. Question No.1 is, accordingly, answered in the affirmative i.e. in favour of the assessee and against the revenue .

5. In relation to question No.2, the facts stated briefly are that the assessee had filed return of income showing a loss of Rs.2,34,470/-. The Assessing Officer refused the claim of carry forward of loss on the ground that the return was filed on 30th September, 1985 whereas the appellant had filed Form No.6 on 31st July, 1985 seeking extension upto 31st August, 1985 only.
6. The assessee carried the matter in appeal before the CIT (A). The Commissioner (Appeals) vide order dated 10th March, 1989 found that the assessee had made an application seeking extension for filing return upto 31st August, 1985, and that the Assessing Officer had not decided the same. In the circumstances, applying the ratio of the decision of this Court in case of Commissioner of Income-tax Vs. Gordhanbhai Jethabhai, [1983] 142 ITR 84 (Guj.) the CIT (Appeals) held that it should be presumed that time had been

granted as sought for. He, accordingly, held that the return filed in the next month was within time and that the appellant was entitled to carry forward of loss.

7. In revenue's appeal, the Tribunal vide order dated 8th September, 1993 found that the assessee had submitted Form No.6 on 31st July, 1985; that the assessee had made an application seeking extension of time upto 31st August, 1985, which had not been decided by the Assessing Officer. That the return was filed on 30th September, 1985, hence, the delay in submitting return was less than one completed month. The Tribunal held that in the light of the principles enunciated by this Court in the case of Commissioner of Income-tax Vs. Gordhanbhai Jethabhai (supra), the Commissioner (Appeals) was justified in concluding that the return filed in the next month should be treated as having been filed within time and that, therefore, the appellant was entitled to carry forward of loss. The Tribunal also found that by a Circular No.422 dated 19th June, 1985 of the Central Board of Direct Taxes (the Board), the Board, after considering various representations, was convinced that tax payers were facing difficulties in getting their accounts audited by the specified date in the first year of the provision, i.e. Section 44AB of the Act. The Board, therefore,

clarified that Assessment Year 1985-86 being the first year of such a requirement, no penalty should be levied for failure to comply with Section 44AB for Assessment Year 1985-86, in case the audit report had been obtained by 30th September, 1985. The Tribunal was, therefore, of the opinion that in case where tax audit report was obtained by 30th September, 1985, in cases where the provisions of compulsory tax audit under Section 44B are applicable, the same should be treated as return filed within the time allowed by the aforesaid general instructions issued by the Board. The Tribunal, accordingly, dismissed the appeal.

8. Mrs. Bhatt has very fairly invited attention to a decision dated 12th August, 2005 of this Court rendered in the case of Commissioner of Income-tax Vs. R.B. Masturlal and Sons Pvt. Ltd., Income Tax Reference No.26 of 1994, wherein this Court had followed its earlier decision in case of Mehsana Ice & Cold Storage Pvt. Ltd. Vs. Commissioner of Income-tax, Income Tax Reference No.107 of 1993 dated 15th March, 2005 and decided the issue in favour of the assessee.
9. In light of the aforesaid fact situation, and the ratio laid down in the decisions of this Court in case of Commissioner of Income-tax Vs. Gordhanbhai Jethabhai (supra) and Mehsana

Ice & Cold Storage Pvt. Ltd. Vs. Commissioner of Income-tax (supra), question No.2 is answered in the affirmative i.e. in favour of the assessee and against the revenue. The Tribunal is justified in directing the Assessing Officer to allow carry forward of business loss determined.

10. The reference stands disposed of accordingly, with no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

*Bhavesh**